

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Association of American Railroads,

Plaintiff,

v.

Dave Yost, Ohio Attorney General, et al.,

Defendants.

Civil Action No. 2:23-cv-02096

Judge Michael H. Watson

Magistrate Judge Kimberly A. Jolson

RULE 26(f) REPORT

Pursuant to Federal Rule of Civil Procedure 26(f), a meeting was held on August 11, 2023, and was attended by:

Jacob T. Spencer and Jonathan N. Olivito, counsel for plaintiff Association of American Railroads (AAR),

John Jones, Werner L. Margard III, and Amy Botschner O'Brien, counsel for defendants Jenifer French, Daniel R. Conway, Dennis P. Deters, Lawrence K. Friedeman, and John D. Williams, Commissioners of the Ohio Public Utilities Commission in their official capacities (Commissioners),

Counsel represent that, during the meeting, they engaged in a meaningful attempt to meet and confer on the matters outlined below.

1. **CONSENT TO MAGISTRATE JUDGE**

Do the parties consent to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)?

_____ Yes X No

2. **INITIAL DISCLOSURES**

Have the parties agreed to make initial disclosures?

_____ Yes X (see below) No _____ The proceeding is exempt under Rule 26(a)(1)(B)

If yes, such initial disclosures shall be made by N/A .

3. VENUE AND JURISDICTION

Are there any contested issues related to venue or jurisdiction?

 X Yes No

If yes, describe the issue:

The Commissioners have raised standing as an affirmative defense.

If yes, the parties agree that any motion related to venue or jurisdiction shall be filed by

AAR and the Commissioners agree that any arguments related to jurisdiction will be addressed in their proposed cross-motions for summary judgment (see below).

4. PARTIES AND PLEADINGS

- a. The parties agree that any motion or stipulation to amend the pleadings or to join additional parties shall be filed by September 11, 2023.
- b. If the case is a class action, the parties agree that the motion for class certification shall be filed by .

5. MOTIONS

- a. Are there any pending motion(s)?

 Yes X No

If yes, indicate which party filed the motion(s), and identify the motion(s) by name and docket number:

- b. Are the parties requesting expedited briefing on the pending motion(s)?

 Yes No

If yes, identify the proposed expedited schedule:

Opposition to be filed by N/A; Reply brief to be filed by N/A.

6. ISSUES

Jointly provide a brief description of case, including causes of action set forth in the complaint, and indicate whether there is a jury demand:

Ohio recently enacted Ohio Rev. Code § 4999.09, which states that “[a] train or light engine used in connection with the movement of freight shall have a crew that consists of at least two individuals.” Ohio Rev. Code § 4999.09(B).

On behalf of its members that operate railroads in Ohio, AAR seeks declaratory and injunctive relief. Its complaint sets forth three causes of action, claiming that Ohio Rev. Code § 4999.09 is (1) preempted in full by the Regional Rail Reorganization Act (“3R Act”), 45 U.S.C. § 797j; (2) preempted in full by the ICC Termination Act (“ICCTA”), 49 U.S.C. § 10501(b); and (3) preempted in part by the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20106.

AAR and the Commissioners agree that these three causes of action present questions of law that can be resolved through cross-motions for summary judgment. In the event this case does go to trial, the Commissioners would demand a jury. AAR does not believe that a jury would be appropriate and reserves all rights to address this issue at the appropriate time.

7. DISCOVERY PROCEDURES

- a. The parties agree that all discovery shall be completed by N/A. The parties agree to schedule their discovery in such a way as to require all responses to discovery to be served prior to the cut-off date, and to file any motions relating to discovery within the discovery period unless it is impossible or impractical to do so. If the parties are unable to reach an agreement on any matter related to discovery, they are directed to arrange a conference with the Court. To initiate a telephone conference, counsel are directed to join together on one line and then call the Magistrate Judge’s chambers or provide the Court with a call -in number.

- b. Do the parties anticipate the production of ESI? _____ Yes X No

If yes, describe the protocol for such production:

- c. Do the parties intend to seek a protective order or clawback agreement? No.

If yes, such order or agreement shall be produced to the Court by _____.

8. DISPOSITIVE MOTIONS

- a. Any dispositive motions shall be filed by September 25, 2023.
- b. Are the parties requesting expedited briefing on dispositive motions?

 Yes X No

If yes, identify the proposed expedited schedule:

Opposition to be filed by October 25, 2023; Reply brief to be filed by N/A.

9. EXPERT TESTIMONY

- a. Primary expert reports must be produced by N/A .
- b. Rebuttal expert reports must be produced by N/A .

10. SETTLEMENT

Plaintiff(s) will make a settlement demand by N/A. Defendant will respond by N/A. The parties agree to make a good faith effort to settle this case. The parties understand that this case will be referred to an attorney mediator, or to the Magistrate Judge, for a settlement conference. The Court refers cases to settlement throughout the year. The parties request the following month and year:

N/A

In order for the conference to be meaningful, the parties agree to complete all discovery that may affect their ability to evaluate this case prior to the settlement conference. The parties understand that they will be expected to comply fully with the settlement conference orders which require, *inter alia*, that settlement demands and offers be exchanged prior to the conference and that principals of the parties attend the conference.

11. RULE 16 PRETRIAL CONFERENCE

Do the parties request a scheduling conference?

 Yes, the parties would like a conference with the Court prior to it issuing a scheduling order. The parties request that the conference take place in chambers by telephone.

 X No, a conference is not necessary; the Court may issue a scheduling order after considering this Report.

12. OTHER MATTERS

Indicate any other matters for the Court's consideration:

AAR and the Commissioners agree that there is no need for discovery in this case because the three causes of action set forth in AAR's complaint present questions of law. As a result, they stipulate and respectfully request that the initial disclosure requirement of Rule 26(a)(1)(A) be waived.

For the same reasons, they propose to litigate this case through cross-motions for summary judgment. They agree that each party's cross-motion should be filed by September 25, 2023 (around 45 days after the Commissioners filed their answer), and that oppositions should be filed by October 25, 2023 (30 days after cross-motions for summary judgment are filed). They do not believe that replies will be necessary.

In the event that this case is not resolved through the parties' cross-motions for summary judgment, the parties would request a scheduling conference after the Court issues its decision on their cross-motions.

Signatures:

Attorney for Plaintiff:

/s/ Jonathan N. Olivito
Counsel for Plaintiff AAR
Bar # 0092169

Attorneys for Defendants:

/s/ Werner L. Margard III (by /s/ Jonathan N. Olivito per authorization)
Counsel for Commissioner Defendants
Bar # 0024858

/s/ Robert A. Eubanks (by /s/ Jonathan N. Olivito per authorization)
Counsel for Commissioner Defendants
Bar # 0073386

/s/ Amy Botschner O'Brien (by /s/ Jonathan N. Olivito per authorization)
Counsel for Commissioner Defendants
Bar # 0074423

Date: August 15, 2023

CERTIFICATE OF SERVICE

I certify that on August 15, 2023, I electronically filed the foregoing with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of this electronic filing to all counsel of record.

/s/ Jonathan N. Olivito

Jonathan N. Olivito